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In the Supreme Court of the United States

OCTOBER TERM, 1993

JOHN F. "DUFFY" CONLEY AND SHEILA F. SMITH
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners contend that the court of appeals erred in reversing an order suppressing certain documents seized from a commercial building pursuant to a search warrant.

1. Petitioners and others were indicted by a grand jury sitting in the Western District of Pennsylvania. They were charged in a multi-count indictment with conspiracy involving gambling with video poker machines and laundering the proceeds of that business, in violation of 18 U.S.C. 371;[1] engaging in an illegal gam-

[1] On September 3, 1993, the district court dismissed the money laundering aspect of the conspiracy count. An appeal by the government from that ruling is pending in the court of appeals.

bling business, in violation of 18 U.S.C. 1955; interstate travel in aid of gambling, in violation of 18 U.S.C. 1952; and money laundering, in violation of 18 U.S.C. 1956(a)(1)(A)(i).

Petitioners moved to suppress evidence seized pursuant to a search warrant. The warrant was for a commercial building occupied by a vending company that owned video poker machines that were being used for gambling. The warrant authorized the seizure of poker machines, accounting records, revenue records, employee records, purchase orders, and paraphernalia indicative of a gambling operation. The search resulted in the seizure of documentary evidence. Pet. App. 2a-5a.

The district court suppressed the seized evidence. The court held that the search warrant was not supported by probable cause, because it lacked information connecting the vending company to the illegal use of the video poker machines. The court also refused to apply the good faith exception to the exclusionary rule set forth in *United States* v. *Leon*, 468 U.S. 897 (1984). Pet. App. 16a-42a; *id.* at 43a-48a. The court did not address petitioners' contention that the warrant was overbroad.

The court of appeals reversed. Pet. App. 1a-15a. The court ruled that the district court should not have conducted a *de novo* review of the magistrate's probable cause determination; that the affidavit for the warrant provided a substantial basis for a finding of probable cause for the search of the premises; and that petitioners' overbreadth challenge to the warrant, focusing on the use of the word "all" in the warrant, lacked merit. *Id.* at 5a-14a.

2. Petitioners first contend (Pet. 9-12) that the search warrant was so broad that it violated the particularity requirements of the Fourth Amendment's Warrant Clause. Second, they argue (Pet. 12-14) that the court of

appeals applied an incorrect standard in reviewing the district court's probable cause determination. Finally, petitioners contend (Pet. 14-18) that the good faith exception of *United States* v. *Leon*, *supra*, should not be applied to save the warrant in this case.

Whatever the merits of petitioners' contentions, they are not presently ripe for review by this Court. The court of appeals' decision places petitioners in precisely the same position they would have occupied if the district court had denied their motion to suppress. If petitioners are acquitted following a trial on the merits, their contentions will be moot. If, on the other hand, petitioners are convicted and their convictions are affirmed on appeal, they will then be able to present their contentions to this Court, together with any other claims they may have, in a petition for a writ of certiorari seeking review of a final judgment against them. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

DREW S. DAYS, III
Solicitor General

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[2] Because this case is interlocutory, we are not responding on the merits to the question presented by the petition. We will file a response on the merits if the Court requests.